

D.T.E. 99-118

Petition of the Attorney General of the Commonwealth of Massachusetts, pursuant to General Laws Chapter 164, § 93, for an investigation of the electric distribution rates of Fitchburg Gas and Electric Light Company.

INTERLOCUTORY ORDER REGARDING SCOPE OF PROCEEDING AND

MOTION TO COMPEL DISCOVERY

APPEARANCES: Thomas F. Reilly, Attorney General

BY: Joseph Rogers

Alexander J. Cochis

Assistant Attorneys General

Regulated Industries Division

200 Portland Street

Boston, MA 02114

Petitioner

Scott J. Mueller, Esq.

Patricia M. French, Esq.

LeBoeuf, Lamb, Greene & MacRae, L.L.P.

260 Franklin Street

Boston, MA 02110

FOR: FITCHBURG GAS AND ELECTRIC

LIGHT COMPANY

Respondent

I. INTRODUCTION AND PROCEDURAL HISTORY

The Attorney General of the Commonwealth of Massachusetts ("Attorney General") filed a written complaint with the Department of Telecommunications and Energy ("Department") regarding the price of the electricity sold and delivered by the Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company") pursuant to G.L. c. 164, § 93 ("Petition"). The matter was docketed as D.T.E. 99-118. The Attorney General requests that the Department institute an investigation into Fitchburg's 1999 electric distribution rates, rate of return and depreciation accrual rates (Petition at 5).

After notice, the Department conducted a public hearing in the Company's service territory in Fitchburg, Massachusetts on December 14, 2000. A procedural conference was held on December 19, 2000, and the Department issued a procedural schedule on January

5, 2001. Fitchburg Gas and Electric Light Company, D.T.E. 99-118, Hearing Officer Memorandum Regarding Procedural Schedule (January 5, 2001).

On January 18, 2001, Fitchburg filed a motion requesting that the Department define the scope of this proceeding ("Scope Motion"). On that same date, Fitchburg filed its objection to nine of the Attorney General's information requests, AG 2-6 through AG 2-14 ("Fitchburg Objection"). On January 25, 2001, the Attorney General filed an opposition to the Scope Motion as well as a cross-motion to compel responses to information requests

AG 2-6 through AG 2-14 ("Motion to Compel"). Fitchburg filed an opposition to the Motion to Compel on February 1, 2001 ("Fitchburg Opposition"). In addition, Fitchburg filed a motion to revise the procedural schedule on February 6, 2001 ("Motion to Revise"). The

Attorney General filed an opposition to the Motion to Revise on February 13, 2001 ("Attorney General Opposition"). In this Order, the Department addresses the following motions:

- (1) Fitchburg's Scope Motion; (2) the Attorney General's Motion to Compel; and
- (3) Fitchburg's Motion to Revise.⁽¹⁾

II. POSITIONS OF THE PARTIES

A. Fitchburg

Fitchburg requests that the Department either limit the scope of its investigation to focus narrowly on the Attorney General's complaint of over-earnings and inadequate depreciation accruals, or expand the investigation (and the procedural schedule) to include a "Section 94-type base rate investigation" (Scope Motion at 4-5; Motion to Revise at 3). The Company argues that the Attorney General's discovery is overly-burdensome and more appropriate to a traditional base rate investigation ("rate case") conducted pursuant to

G.L. c. 164, § 94 ("§ 94") (Scope Motion at 5; Motion to Revise at 3; Fitchburg Objection at 2-10; Fitchburg Opposition at 6).

The Company objected to Information Requests AG-2-6 through AG-2-14 on the grounds that they were overly broad, burdensome and beyond the reasonable scope of this proceeding (Fitchburg Objection at 1-10). The Company maintains that the information sought in these requests includes various costs related to distribution operations which are not separately accounted for in the Company's ordinary course of business (Fitchburg Brief at 3).

In order to respond to the Attorney General's discovery, the Company argues that it would need to conduct the type of cost of service analysis generally performed only in the context of a § 94 rate case (Scope Motion at 5). Even if the Department were to find a basis to order a rate decrease based on the limited scope of the investigation requested in the Attorney General's complaint, Fitchburg argues that it would still need to perform a full cost of service analysis (Motion to Revise at 6). Asserting that any adjustment to its base rates must be made "prospectively and in the context of a review of a proformed cost of service analysis," Fitchburg argues that it will be more efficient for the Department to revise the procedural schedule and permit the Company to file a cost of service study based on calendar year 2000 historical data (Scope Motion at 5-6; Motion to Revise at 6).

B. Attorney General

The Attorney General argues that the Department has adequately defined the scope of this proceeding (Motion to Compel at 3). The Attorney General argues that the

Department has provided Fitchburg with sufficient notice of the issues involved in this proceeding and has afforded it reasonable opportunity to prepare and present evidence and argument (id. at 3, citing G.L. c. 30A, § 11).

The Attorney General argues that the scope of any proceeding pursuant to G.L. c. 164, § 93 ("§ 93") is necessarily broad due to the numerous issues involved in rate determinations (Motion to Compel at 5). The Attorney General argues that the filing of a complaint pursuant to § 93 places a company on notice of the same issues as contained in a § 94 rate case (id. at 4). The Attorney General contends that his Petition encompasses both Fitchburg's costs and revenues, which are within the scope of this proceeding as noticed by the Department (id. at 5). The Attorney General argues that his discovery is designed to obtain cost and revenue information relevant to this proceeding (id. at 5-6). In responding to the Company's Motion to Revise, the Attorney General filed an opposition motion on February 13, 2001 arguing that there has been ample time for the Company to have prepared a cost of service study to the Attorney General's Information Requests (Attorney General Opposition at 4-5). Accordingly, the Attorney General states that the existing procedural schedule provides a full and fair opportunity for the parties to present their cases (id. at 5).

III. ANALYSIS AND FINDINGS

G.L. c. 164, § 93 states in, pertinent part:

On written complaint of the [A]ttorney [G]eneral, . . . as to the quality or price of the gas or electricity sold and delivered, the [D]epartment shall notify said company by leaving at its office a copy of such complaint, and shall thereupon, after notice, give a public hearing to such complaint and said company, and after such hearing may order any reduction or change in the price or prices of gas or electricity. . .

There is little recent precedent on the conduct of rate investigations commenced as a result of a § 93 petition. While § 93 investigations were common during the 1920s and 1930s, more recent § 93 investigations concerning allegations of excessive rates tended to be settled

or voluntarily withdrawn by the parties. See e.g., Boston Edison Company, D.T.E. 98-14 (1998); Plymouth Water Company, D.P.U. 91-254 (1992); Boston Gas Company, D.P.U. 87-161 (1988). In some cases, the issues raised in a § 93 petition were addressed by a subsequent § 94 rate petition filed independently from the pending § 93 investigation. Salisbury Water Supply Company, D.P.U. 89-207, at 1 (1995); High Wood Water Company, D.P.U. 90-57/89-83/88-180, at 1-2 (1990).

By requesting that the Department expand the procedural schedule to permit a full cost of service study, Fitchburg, in effect, proposes that the Department dismiss the § 93 petition and substitute for it a § 94 rate case. Alternatively, Fitchburg recommends that the Department limit its investigation to focus narrowly on the Attorney General's complaint of over-earnings. However, even if the Department were to conduct this latter, more narrow earnings investigation, Fitchburg maintains that a full cost of service study would be required before the Department could order any reduction in its rates.

Fitchburg's proposal to substitute a § 94 rate case for the § 93 earnings investigation is similar to the outcome reached in D.P.U. 87-161. In that case, Boston Gas Company entered into a settlement with the petitioners whereby its § 93 petition would be voluntarily withdrawn and substituted with the filing of a § 94 rate case. However, unlike the parties to D.P.U. 87-161, the petitioner in the current proceeding has not agreed to withdraw his complaint. The Supreme Judicial Court has described § 93 as a procedure whereby petitioners can "compel official hearing of their grievances." Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities, 368 Mass. 599, 609 (1975). Once a price-related issue is properly raised by a § 93 complaint, the Department is compelled by statute to give appropriate notice, hold a public hearing and order any suitable change in the price of gas or electricity. Without agreement of the petitioner, we generally would not convert a § 93 earnings investigation into a § 94 rate case. Accordingly, the scope of the present investigation, as noticed, is an investigation of the distribution rates for Fitchburg's electric operations. See Fitchburg Gas and Electric Light Company, D.T.E. 99-118, Notice of Public Hearing (November 15, 2000).

The scope of this proceeding, as noticed, does not require an amendment of the procedural schedule or groundrules. The Company has had adequate notice of the issues raised by this investigation and will have sufficient time to prepare its defenses to the allegations raised in the Attorney General's Petition. Accordingly, the Company's motion to revise the procedural schedule is denied.

Concerning the analytical methods that would apply in a § 93 proceeding, although this § 93 earnings investigation is not a § 94 rate case, certain aspects of our investigation may resemble customary rate case practice because the techniques of rate analysis applied in § 94 investigations are a recognized and familiar basis for examining a utility's revenues, expenses, and investments. However, the issues that may be raised in a § 93 petition are broad in scope, and may include a wide range of issues concerning rates and quality of service. This range of potential issues justifies the use of investigative approaches that are appropriate to reach findings on the issues under consideration. See Cape and Vineyard Electric Company, D.P.U. 17257 (1972); Fitchburg Gas and Electric Light Company, D.P.U. 17018 (1972). Therefore, while customary rate case practices may be applicable to an investigation entered into pursuant to § 93, the Department is not bound by the requirements of a § 94 rate case when conducting a § 93 earnings investigation.⁽²⁾

With respect to the Company's argument that a cost of service study is a prerequisite to any rate adjustment ordered pursuant to a § 93 investigation, Fitchburg is in error. A utility's revenue requirement is determined independently from the allocation of its revenue requirement among the utility's rate classes.⁽³⁾ In contrast, the purpose of a cost of service study is to allocate a company's overall revenue requirement in order to determine the cost to serve each individual rate class. Colonial Gas Company, D.P.U. 86-27-A at 9 (1988); Massachusetts Electric Company, D.P.U. 85-146, at 7 (1986). While a cost of service study is often considered an important element in the allocation of rates in a § 94 proceeding, the lack of an approved cost of service study does not prevent the allocation of a utility's established revenue requirement among the utility's respective rate classes.⁽⁴⁾

If the Department were to determine that the Company is over-earning, § 93 grants the Department authority to order any reduction or change in the price or prices of gas and electricity. Assuming a finding of excessive rates, the Department has considerable discretion as to the implementation of the appropriate remedy, taking into account the underlying facts. For example, the Department may authorize an across-the-board rate decrease, or eliminate the revenue surplus through selective rate adjustments determined by the record evidence. Lynn Gas and Electric Company, D.P.U. 8390, at 6 (1949); Millbury Water Company, D.P.U. 5244, at 2-3 (1936). Therefore, while we will not preclude consideration of a cost of service study if the Company presents one as part of its case, it is not a required element of this § 93 earnings investigation.

With respect to the time period covered by the Department's investigation in this matter, the use of a calendar test year is the most efficient means to conduct such an investigation. When considering a § 94 rate case, the Department examines a test year, which usually represents the most recent twelve-month period for which complete financial information exists, on the theory that the revenue, expense, and rate base figures during that period accurately reflect the utility's present financial situation and fairly predict the company's future performance. To the extent that known or anticipated changes in revenues, expenses, or rate base will distort the correlation among these elements, adjustments are made in the test year data to reflect those changes. Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 24, 375 N.E.2d 305 (1978) *cert. denied* 439 U.S. 921 (1978). These same principles apply to a § 93 earnings investigation. In addition, the Company already files its costs and revenues on a calendar-year basis in its annual report to the Department.

With respect to the proper "test year," the Attorney General has requested that the Department investigate the Company's distribution rates for 1999. Information for 1998, the most recent year of data as of the time of filing of the Petition, is readily available from the Company. However, earnings for that year may be distorted by the onset of retail access on March 1, 1998. The most recent year for which complete financial data is readily available is 1999. More recent financial information for 2000 will not be available for several months. In addition, financial information for 1999 fully takes into account the fact that Fitchburg is now a distribution company (*i.e.*, it had divested or was in the process of divesting its generation assets). The Company's distribution earnings constitute

a more accurate indication of the magnitude of earnings that a company can expect to achieve on a going-forward basis. For these reasons, we will base our investigation of Fitchburg's electric distribution rates on calendar year 1999.

With respect to the Attorney General's Motion to Compel, the Company has objected to information requests AG-2-6 through AG-2-14. Information requests AG-2-6 and AG-2-7 seek balance sheet information. Information requests AG-2-8, AG-2-9, and AG-2-11 seek information regarding the Company's distribution revenues and expenses. Information request AG-2-10 seeks information regarding the Company's capital structure. Information requests AG-2-12, AG-2-13 and AG-2-14 seek wage and salary information. In addition, information request AG-2-14 specifically seeks wage and salary information for each component of the company's rates (e.g., distribution, transmission, standard offer, default and demand-side management). All of these requests seek information for multiple calendar years.

The Company argues that responding to these requests would require it to conduct a cost of service analysis for several test years, which would be onerous in light of the current procedural schedule (Fitchburg Opposition at 1, 3). The Attorney General disputes the onerous nature of these requests, arguing that the information is either readily available or the product of simple calculations (Motion to Compel at 8-9).

The data sought by information requests AG-2-6 through AG-2-13 can be used to calculate the Company's earnings for a particular test year. It is, therefore, reasonably calculated to lead to the discovery of admissible evidence and relevant to our earnings investigation in this case. We are also not convinced that the information sought by AG-2-6 through AG-2-13 would be unduly burdensome for the Company to produce, even within the context of the current procedural schedule. Responding to the majority of these requests involves compiling data that are readily available to the Company through its accounting records. The Company therefore will be required to respond to information requests AG-2-6 through AG-2-13. Consistent with the groundrules issued in this proceeding, the Company shall respond to these request within five business days of the date of this Order.

We will, however, limit the time period for the Company's responses for calendar years 1999 and 2000. The Company will not be required to produce information requested for the year 1998, (as sought by information requests AG-2-6 and AG-2-7), as this predates the 1999 test year which forms the basis for this earnings investigation. While the focus of our earnings investigation is on calendar year 1999, information for year 2000 may, to the extent it is reasonably available during the proceeding, be relevant to the Department's consideration of any appropriate reduction or change in the Company's rates, as guided by our longstanding ratemaking precedent.

The information sought by information request AG-2-14 seeks the same information as AG-2-13, but on a much more detailed basis (i.e., wage and salary information for the Company's electric division attributed to each of the services it provides). While wage

and salary information is pertinent to this earnings investigation, the level of detail sought by

AG-2-14 would not further an analysis of the Company's earnings. In addition, it is likely that the information would be overly burdensome for the Company to produce. Therefore, we will not require the Company to respond to AG-2-14.

IV. ORDER

After review and consideration it is:

ORDERED: That the scope of the present investigation, as noticed, is an investigation of the distribution rates for Fitchburg's electric operations for calendar year 1999; and it is

FURTHER ORDERED: That the Attorney General's Motion to Compel is GRANTED in part and DENIED in part consistent with the directives contained herein; and it is

FURTHER ORDERED: That Fitchburg Gas and Electric Light Company's Motion to Revise the procedural schedule is DENIED.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr. Commissioner

Deirdre K. Manning, Commissioner

1. On January 16, 2001 Fitchburg filed a motion to dismiss the Attorney General's Petition. The Attorney General filed an opposition to the motion to dismiss on January 22, 2001. This Order does not address Fitchburg's motion to dismiss.
2. For example, in Lynn Gas and Electric Company, D.P.U. 8390, at 5-6 (1949), the Department confined its § 93 investigation to a review of that company's revenues, payroll expense, and property taxes, to establish a return on rate base for both gas and electric operations.

3. To this day, most water companies do not submit allocated cost of service studies when filing a § 94 rate petition.

4. In the absence of an approved cost of service study, the Department has allocated a revenue increase on both an equal percentage basis over then-existing rates and an equal cents per unit (i.e., kilowatt-hours, cubic feet, or gallons) applied to then-existing rates. Milford Water Company, D.P.U. 92-101, at 68 (1992); Colonial Gas Company, D.P.U. 84-94, at 79 (1984); Western Massachusetts Electric Company, D.P.U. 957, at 97 (1982).